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No. 95-1089

# In the Supreme Court of the United States

OCTOBER TERM, 1995

THE PITTSTON COMPANY, ET AL., PETITIONERS

*v.*

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the United States District Court for the District of Columbia has exclusive jurisdiction over challenges to nationwide regulations issued under the Surface Mining Control and Reclamation Act of 1977.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 66 F.3d 714. The opinion of the district court (Pet. App. 4a-27a) is reported at 798 F. Supp. 344.

### JURISDICTION

The judgment of the court of appeals was entered on October 6, 1995. A petition for rehearing was denied on December 11, 1995. Pet. App. 42a-43a. The petition for a writ of certiorari was filed on January 5, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, requires businesses engaged in mining coal to obtain a permit before mining. 30 U.S.C. 1256(a). The SMCRA is administered by the Secretary of the Interior through the Office of Surface Mining Reclamation and Enforcement (OSM). Pet. App. 5a. Many coal-producing States, including respondent Commonwealth of Virginia, have authority to issue permits subject to OSM oversight. *Id.* at 10a. n.3.

Under Section 510(c) of the Act, when "information available to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation of [the SMCRA or other pollution control laws], the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected." 30 U.S.C. 1260(c). In 1988, the Secretary of the Interior issued nationwide regulations that define "owned or controlled." 30 C.F.R. 773.5. Under those regulations, there is a presumption of ownership or control when a person owns or controls coal to be mined by another person and has the right to receive such coal after mining. 30 C.F.R. 773.5(b)(6). A challenge to those regulations was rejected by the District Court for the District of Columbia. *National Wildlife Fed'n* v. *Babbitt*, Nos. 88-3117, 88-3464 & 88-3470 (Aug. 31, 1995). An appeal of that judgment is pending in the United States Court of Appeals for the District of Columbia Circuit.

*National Mining Ass'n* v. *Babbitt*, No. 95-5434 (filed Dec. 28, 1995).

OSM has established a computer system that identifies whether an applicant for a permit is linked by ownership or control to a person with outstanding violations of mining laws. Pet. App. 6a. When that system identifies a link to an unabated violation, OSM will give the entity an opportunity to show that it is not linked to the violation or that the violation is being corrected or is subject to a good faith appeal. *Id.* at 7a-8a. OSM will not, however, review the validity of the underlying violation. *Id.* at 8a. If there is no response or OSM finds the response unpersuasive, it will issue a final decision recommending a denial of the permit to the regulatory authority. *Ibid.* That decision is subject to administrative and judicial review. *Id.* at 8a-9a.

Even if review of OSM's decision is not sought, the applicant may still attempt to persuade the regulatory authority that it is not linked to the violation. Once again, however, it may not challenge the validity of the underlying violation. If the regulatory authority denies the permit, the applicant may obtain administrative and judicial review of that decision, and may challenge the validity of the underlying violation. Pet. App. 10a-11a.

2. Petitioner Pittston Company, through its subsidiary Clinchfield Coal Company, is engaged in the business of mining in Virginia and other States. Pet. App. 4a-5a. Petitioner contracts with mining firms, known as contract miners, that mine the coal for petitioner. The contract miners obtain permits in their own names, but petitioner retains the right to receive the coal after mining. *Ibid.* In December 1990, OSM notified petitioner that contract miners it

controlled had outstanding violations of SMCRA. *Id.* at 11a. OSM further notified petitioner that it would be blocked from obtaining permits unless it agreed to abate the violations or demonstrated that it did not control the contract miners. *Id.* at 12a.

In response, petitioner filed suit in the United States District Court for the Western District of Virginia. Pet. App. 12a-13a. Petitioner alleged that blocking its permit applications based on violations by its contract miners would violate the Due Process Clause because petitioner was not a party to the prior actions against the contractors and did not have notice or an opportunity to contest the underlying violations. *Id.* at 13a. Petitioner sought an injunction barring OSM and the Commonwealth of Virginia from blocking its future permit applications based on the violations committed by its contract miners. *Ibid.*

The district court issued a preliminary injunction prohibiting the blocking of permits in Virginia based on the violations by the contract miners. Pet. App. 13a. The court later expanded the injunction to prohibit the blocking of permits based on any violation of any mine operator owned or controlled by petitioner in any State. *Id.* at 38a. Ultimately, however, the district court dismissed petitioner's complaint for lack of jurisdiction. *Id.* at 4a-28a. The court held that 30 U.S.C. 1276(a)(1) gives the District Court for the District of Columbia exclusive jurisdiction over challenges to nationwide regulations issued under SMCRA, and it concluded that petitioner's complaint challenged such regulations. Pet. App. at 15a-27a. The court rejected petitioner's contention that it was attacking only the agency's action in blocking permits, and not the ownership and control regulations themselves. *Id.* at 23a-24a. The court

explained that the regulations themselves required the regulatory authority to deny permits to parties linked to prior violations without examining the validity of the underlying violations. *Id.* at 24a. Any challenge to such an action was therefore "tantamount to an attack on the regulations themselves which can be brought only in the District of Columbia." *Ibid.*

The court of appeals affirmed the district court's dismissal for lack of jurisdiction, Pet. App. 1a-3a, relying on "the compelling reasoning of the district court." *Id.* at 3a.

**ARGUMENT**

1. a. Petitioner contends (Pet. 11-14) that federal district courts outside the District of Columbia have concurrent jurisdiction over challenges to nationwide regulations issued under SMCRA. That contention is without merit. As the Third, Fourth, Eleventh, and Federal Circuits have held, 30 U.S.C. 1276(a)(1) gives the District of Columbia district court exclusive jurisdiction over such challenges. *United States* v. *Troup*, 821 F.2d 194, 197-199 (3d Cir. 1987); *Clinchfield Coal Co.* v. *Department of Interior*, 802 F.2d 102 (4th Cir. 1986) (per curiam); *Virginia* v. *Watt*, 741 F.2d 37 (4th Cir. 1984); *Tug Valley Recovery Ctr.* v. *Watt*, 703 F.2d 796 (4th Cir. 1983); *Drummond Coal Co.* v. *Watt*, 735 F.2d 469, 472-476 (11th Cir. 1984); *Amerikohl Mining, Inc.* v. *United States*, 899 F.2d 1210, 1213-1215 (Fed. Cir. 1990).

The text of Section 1276(a)(1) specifically designates the District of Columbia district court as the forum for challenges to nationwide SMCRA regulations. See 30 U.S.C. 1276(a)(1) ("Any action by the Secretary promulgating national rules or

regulations [under SMCRA] * * * shall be subject to judicial review in the United States District Court for the District of Columbia Circuit."). Under established principles of statutory construction, such a specific designation shows that Congress intended for the forum to be exclusive, and "this result does not depend on the use of the word 'exclusive' in the statute providing a forum for judicial review." *Troup*, 821 F.2d at 198; see also *Save Our Cumberland Mountains, Inc.* v. *Lujan*, 963 F.2d 1541, 1550 (D.C. Cir. 1992), cert. denied, 507 U.S. 911 (1993); *Denberg* v. *United States R.R. Retirement Bd.*, 696 F.2d 1193, 1195 (7th Cir. 1983), cert. denied, 466 U.S. 926 (1984); *Aminoil U.S.A., Inc.* v. *California State Water Resources Control Bd.*, 674 F.2d 1227, 1235 (9th Cir. 1982); *City of Rochester* v. *Bond*, 603 F.2d 927, 935 (D.C. Cir. 1979); *Getty Oil Co. (Eastern Operations), Inc.* v. *Ruckelshaus*, 467 F.2d 349, 356 (3d Cir. 1972), cert. denied, 409 U.S. 1125 (1973); *Gardner* v. *Alabama*, 385 F.2d 804, 810 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968); cf. *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422 (1965) (when Congress has specified a scheme of review, that scheme must be followed notwithstanding the absence of an express command of exclusiveness).

In addition, Section 1276(a)(1) states that national regulations "*shall* be subject to judicial review in the United States District Court for the District of Columbia." 30 U.S.C. 1276(a)(1) (emphasis added). As the Eleventh Circuit has explained, "[t]he word 'shall' is a mandatory, not permissive, form and indicates a congressional intent to require that judicial review of regulations having nationwide application occur in the federal district court in the District of

Columbia." *Drummond*, 735 F.2d at 473 (footnote omitted); see also *Amerikohl*, 899 F.2d at 1213; *Troup*, 821 F.2d at 198.

Finally, if Congress had not specifically designated the District of Columbia district court as a forum for challenges to nationwide regulations, that court would nonetheless have had jurisdiction and venue to hear such challenges under 28 U.S.C. 1331 and 28 U.S.C. 1391(e)(2). *Drummond*, 735 F.2d at 474 n.10. Thus, the specific designation of that court as a forum for such challenges reinforces the conclusion that it is the exclusive forum.

Petitioner argues that, because the House and Senate versions of Section 1276(a)(1) both provided that nationwide regulations were subject to review "only" in the District of Columbia district court, and the conference committee deleted the word "only," the final bill does not provide for exclusive jurisdiction. Pet. 12-13. The conference committee report, however, does not state why the word "only" was deleted. See H.R. Rep. No. 493, 95th Cong., 1st Sess. 111 (1977). And "[u]nexplained changes made in committee are not reliable indicators of congressional intent." *Drummond*, 735 F.2d at 474. The conference committee could have readily concluded that the specific designation of the District of Columbia district court as the forum for reviewing nationwide regulations and the use of the word "shall" were sufficient to confer exclusive jurisdiction, and that the use of the word "only" was therefore redundant. *Ibid.* Alternatively, the deletion "may have been completely inadvertent." *Ibid.*; see also *Amerikohl*, 899 F.2d at 1213-1214. Because the conference committee did not state that the deletion was intended to change

the meaning of the bill, no such intent should be imputed to Congress.

Petitioner's reliance on *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), is also misplaced. In that case, the Court held that, because there is a presumption of reviewability of administrative action, the fact that certain regulations were made reviewable did not support an inference that Congress intended to foreclose review of other regulations. *Id.* at 140-141. The construction of Section 1276(a)(1) adopted by the court below, however, does not foreclose judicial review of nationwide SMCRA regulations. Instead, it restricts review of such regulations to a specific forum. The principle involved in *Abbott Laboratories* is therefore inapplicable here.

b. As petitioner notes (Pet. 8), the construction of Section 1276(a)(1) adopted by the court below conflicts with the Sixth Circuit's decision in *Holmes Limestone Co.* v. *Andrus*, 655 F.2d 732 (1981), cert. denied, 456 U.S. 995 (1982). That conflict, however, does not warrant this Court's review. *Holmes* was the first appellate decision on the jurisdictional question presented here, and it was decided 15 years ago. Since *Holmes*, four circuits have addressed the jurisdictional issue, and all have expressly rejected the reasoning in *Holmes*. See *Virginia*, 741 F.2d at 41 n.5 (4th Cir.); *Amerikohl*, 899 F.2d at 1213-1214 (Fed. Cir.); *Troup*, 821 F.2d at 199 (3d Cir.); *Drummond*, 735 F.2d at 473 (11th Cir.). In that same period, the Sixth Circuit has not been asked to review a nationwide SMCRA regulation, and therefore has not had an opportunity to reexamine its decision in *Holmes* in light of the decisions from the other circuits. Given the unanimity in the circuits since *Holmes*, there is every reason to believe that the Sixth Circuit will be

willing to reexamine that decision. If that expectation is not fulfilled, and the Sixth Circuit adheres to *Holmes*, the jurisdictional question would be ripe for consideration by this Court. There is no reason, however, to review that issue now.

Petitioner asserts that, because the Sixth Circuit cited *Holmes* in *Horizon Coal Corp.* v. *United States*, 43 F.3d 234, 240 n.5 (1994), there is no prospect that the circuit conflict will be resolved absent a decision by this Court. Pet. 9. *Horizon*, however, did not involve a challenge to nationwide SMCRA regulations. Instead, it involved a suit for a refund of reclamation fees. The court held that district courts have jurisdiction concurrent with the Court of Federal Claims to resolve such suits. 43 F.3d at 239-240. The only reference to *Holmes* appears in a footnote; the reference in that footnote is not to the majority decision, but to Judge Merrit's concurring opinion; and that opinion is cited for the limited proposition that "a finding that the United States Claims Court has exclusive jurisdiction over operator reimbursement actions would work a hardship against operators by requiring them to litigate their claims in Washington, D.C., rather than in the appropriate district court." *Id.* at 240 n.5. *Horizon* therefore does not support petitioner's view that there is no prospect that the Sixth Circuit will reexamine its holding in *Holmes* should the jurisdictional issue regarding nationwide regulations arise again.

c. Petitioner contends (Pet. 9) that *B & M Coal Corp.* v. *OSM*, 699 F.2d 381 (7th Cir. 1983), and *Tug Valley Recovery Ctr.* v. *Watt*, 703 F.2d 796 (4th Cir. 1983), both permitted constitutional challenges to nationwide regulations to be maintained outside the

District of Columbia and are therefore in conflict with the decision below. There is, however, no such conflict. In *B & M*, the question presented was "whether section 518(c) of [SMCRA], which requires an escrow deposit of a proposed penalty assessment prior to a formal hearing, is unconstitutional as violative of procedural due process rights secured by the fifth amendment." 699 F.2d at 382. Without discussing the jurisdictional issue, the court upheld the constitutionality of Section 518(c). 699 F.2d at 384-385. Because *B & M* involved a challenge to the underlying statute, and because the court in that case did not even discuss the jurisdictional question, it does not conflict with the decision below.

In *Tug Valley*, the court rejected a claim that the implementation of a state law violated the Constitution, without discussing the jurisdictional question. 703 F.2d at 801-802. The Fourth Circuit subsequently held that constitutional challenges to nationwide regulations must be heard exclusively in the District of Columbia, *Virginia*, 741 F.2d at 40, and the decision below followed that holding. Pet. App. 23a-24a. Because *Tug Valley* involved a challenge to state law, and did not discuss the jurisdictional question, it does not conflict with the decision below. Even if those two Fourth Circuit decisions could not be reconciled, however, such an intra-circuit conflict would not warrant this Court's review.

2. Petitioner alternatively contends (Pet. 14-16) that its due process challenge is to the application of the ownership and control regulations rather than to the regulations themselves, and that the provision requiring challenges to nationwide regulations to be heard in the District of Columbia is therefore inapplicable. That fact-specific contention does not

raise any issue of general importance warranting this Court's review.

In any event, the courts below correctly characterized petitioner's challenge as a challenge to the regulations themselves. As the district court explained (Pet. App. 23a-24a), the regulation defining ownership and control, 30 C.F.R. 773.5, and the permit review regulation, 30 C.F.R. 773.15(b), together require a regulatory authority to deny a permit application when an applicant is linked to an outstanding violation, without examining the validity of the underlying violation. Petitioner's due process challenge to the refusal to allow an applicant for a permit to contest the underlying violation is therefore necessarily a challenge to the regulations themselves. As such, it must be heard in the District of Columbia. Indeed, a due process challenge to the regulations filed by mining industry representatives is currently pending in the D.C. Circuit, see page 2, *supra*, and will be resolved there in due course.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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